MARCOS CAMACHO
A LAW CORPORATION

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Mr. J. Antonio Barbosa
Executive Secretary, ALRB
915 Capitol Mall, Third Floor
Sacramento, Ca. 95814
(Fax) 916 653 8750

RE: Notice Of Opportunity To Provide Written And Oral Argument
Related Case: Gallo Vineyards, Inc., 03-CE-9-SAL, 03-CE-9-1-SAL

In response to the Notice Of Opportunity To Provide Written And Oral Argument ("Notice") dated June 18, 2004, the United Farm Workers of America, AFL-CIO ("UFW") hereby submits its written argument.

INTRODUCTION

In answering the three questions posed by the Board in its Notice, the Board should be mindful of the Legislative intent embodied in the Agricultural Labor Relations Act. As stated in section 1140.2 of the Act, it is the "policy of the State of California to encourage and protect the right of agricultural employees" to "self-organization, and designation of representatives of their own choosing" and to be free from employer interference in the designation of such representatives or in self organization. ALRA § 1140.2. It is this strong Legislative intent to "encourage" workers in organizing themselves and selecting representatives, and to strictly keep employers out of the selection of representation that make the ALRA protections *go well beyond* any protections contained in the National Labor Relations Act. Thus, while the NLRA permits voluntary recognition of unions, employer petitions for elections, and withdrawals of recognition, the ALRA in order to be consistent with the Legislative intent set forth above does not permit any such employer action. Clearly, this significant difference shows that the Legislature in crafting the ALRA was eminently concerned with strictly prohibiting any employer involvement in any matter involving employee selection of representatives. It is these strong legislative policies that should guide this Board in making a final determination that any employer involvement in any decertification matter must be strongly discouraged and clearly prohibited.

QUESTION 1

What are the existing standards under the Agricultural Labor Relations Act and the National Labor Relations Act regarding the level of unlawful employer assistance, short of instigation, that warrants a decertification petition and setting aside any subsequent election; i.e., is any level of assistance sufficient, or must the assistance be of a particular nature or scope in order to warrant the remedy of dismissing the petition?

SHORT ANSWER

Board case law under both the ALRA and NLRA does not distinguish between unlawful instigation and unlawful assistance for purposes of deciding whether a decertification petition should be dismissed.[1] In addition, neither the ALRB nor the NLRB classify or categorize the level of employer assistance or instigation, as "minimal" versus "severe." Instead, both the ALRB and NLRB will summarily dismiss a decertification petition involving ***any*** level of either assistance or instigation, regardless of how "minimal" or "severe" the employer involvement may be. This is because any level of assistance or instigation is said to taint and nullify any question concerning representation and subsequent election.

DISCUSSION

I. A CENTRAL PURPROSE OF BOTH THE ALRA AND NLRA IS TO PROHIBIT ANY EMPLOYER INTERFERENCE IN ELECTION MATTERS.

One of the central purposes of both the ALRA and NLRA is to draw a clear line of demarcation between supervisory representatives of management on one hand, and employees on the other. This is clearly evident in both Acts, which for instance, prohibit bargaining units made up of rank-and-file employees on one hand, and confidential employees, guards, and supervisory employees, on the other. With this attempt to clearly divide employees and supervisors, both Boards have developed rules that prohibit supervisors or agents of the employer to act as employee representatives and to file decertification petitions. This is because permitting supervisors or their employer agents to file decertification petitions would squarely defeat one of the central purposes of the Act. Clyde J. Merris (1948) 77 NLRB 1375, 1377; M. Caratan, Inc. (1983) 9 ALRB 33, at 7. For this reason, decertification proceedings provide a remedy exclusively for and on behalf of employees, and not employers. Bond Stores, Inc. (1956) 116 NLRB 1929.

Whereas both the ALRB and NLRB show heightened concern for protecting employee rights to choose their representative, the ALRA has historically afforded more protections to employees in this respect. For instance, in F & P Growers Assoc. (1985) 168 Cal. App 3d 667, the ALRB and Appeals Court ruled that significant differences between the ALRA and NLRA did not require the ALRB to follow national Board precedent with respect to decertification issues. The Board and Court pointed to the following significant differences between the two Acts in ruling that NLRB precedent should not be followed: (1) the ALRA does not permit voluntary recognition of a union,

[1] "Initiation" of a decertification petition has been defined as "implanting the idea of decertification in the minds of Petitioners." See Abatti Farms, Inc. (1981) 7 ALRB 36 at 5 - 6, *citing* Sperry Gyroscope (1962) 136 NLRB 294, Wahoo Packing Co. (1966) 161 NLRB 174 and other cases. Assistance is described as lending some form of support to decertification petitioners, absent initiation. Abatti Farms, Id. at 5 – 6. However, the two are not mutually exclusive. Other words for initiation include "instigation" and "fostering." Nevertheless, both the NLRB and ALRB freely use such words as "initiation," "instigation," "fostering," "encouraging," "assisting," and "lending support," in cases involving employer initiation and/or assistance.

while the NLRA does; (2) the ALRA does not permit employers to file for elections (representation or decertification), whereas the NLRA permits employers to file for representation elections; and (3) the NLRA permits withdrawal of recognition whereas the ALRA does not. F & P Growers, Id. 673 – 677.[2] Therefore, the California Legislature was highly concerned with prohibiting an employer "from being an active participant in determining" union representation. See F & P Growers, Id. at 673 – 677. In fact, the California Legislature took steps to afford employees under the ALRA more protection (from employer assistance and instigation of petitions) than that contained in the NLRA. This Board should take notice of these historical protections afforded to employee choice under the ALRA and absent under the NLRA in deciding that any level of employer assistance or instigation in a decertification petition should nullify that petition and cause the Board to dismiss it.[3]

II. BOTH THE ALRA AND NLRA REQUIRE DISMISSAL OF A DECERTIFICATION PETITION WHEN THERE HAS BEEN ANY EMPLOYER INVOLVEMENT IN THE DECERTIFICATION PROCESS.

In determining whether the line between employer and employees has been blurred or tainted, both the ALRB and NLRB look to whether Respondent has given more than "ministerial aid" to an employee or employees who attempt to decertify a union. See Silver Spur Casino (1984) 270 NLRB 1067, 1072; Peter D. Solomon (1983) 9 ALRB 65, p.7. In Peter D. Solomon, the Board explained that "ministerial aid" might include such conduct as responding to employees' questions or inquiries concerning their rights to decertify. In contrast, unlawful "material aid" or assistance includes arranging for free legal representation for the purpose of decertifying a union, driving the workers to a decertification meeting, providing leaves of absences and other benefits to proponents of decertification, or when employer agents or supervisors assemble and direct employees in obtaining signatures for decertification petitions. See Peter D. Solomon, Id. at 7 – 8; Abatti Farms (1981) 7 ALRB 36, at 5 – 7.

Therefore, if the employer's conduct goes beyond ministerial acts, the employer has unlawfully instigated or assisted the workers, and has interfered with its employees' free exercise of their right. Most importantly, ***any*** employer assistance or instigation has "invalidated the election as a measure of employees' free choice." Peter D. Solomon, 9 ALRB 65, at 8; see also Abatti Farms, Inc. (1981) 7 ALRB 36, at 7. In other words, a decertification petition which has been *initiated or assisted* by an employer "cannot be said to have raised a question concerning representation." Sperry Gyroscope Co. (1962) 136 NLRB 294, 297.

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[2] Moreover, the NLRA permits petitions for withdrawal of dues payments, while the ALRA does not.

[3] The Union believes NLRA precedent should be used to guide the ALRB in cases involving employer assistance or instigation, but because of the significant differences between the two Acts, NLRB decision should not be binding on the ALRB. Still, even under NLRA standards, the type of assistance and instigation in the Gallo Vineyards, Inc. case would and should result in a ruling to dismiss the decertification petition.

The mass of case authority under both the ALRA and NLRA require dismissing decertification petitions where there has been *any taint of employer involvement in decertification efforts, whether by instigation or assistance*. See e.g. Abatti Farms, Inc. (1981) 7 ALRB 36, at 7*,* 15 ("Because of Respondent's *support and assistance* of the decertification campaign, the Petition for Decertification shall be, and it hereby is, dismissed") (emphasis added); Peter D. Solomon, *supra,* at 9 – 10 (following the "national board" and stating that because the employer *instigated and assisted* in the decertification efforts, thereby violating employees' free exercise rights, the Board is "*required* to dismiss the decertification election petition") (emphasis added); S & J Ranch, Inc. (1992) 18 ALRB 2, at 17 (setting aside a decertification petition because the petition was "improperly tainted by *employer involvement*," "was invalid from the outset, and therefore did not raise a bona fide question concerning representation") (emphasis added); Sperry Gyroscope, *supra,* at 297 (since a decertification petition *initiated and sponsored* by the employer cannot raise a question concerning representation, "we shall in accordance with our *usual practice* order that the petition be dismissed, and that all proceedings on that petition be vacated and set aside and declared a nullity") (emphasis added); M. Caratan, Inc. (1983) 9 ALRB 33, at 7 (dismissing a decertification petition filed by an agent of the employer); Bond Stores, Inc., *supra*, 116 NLRB 1929 at 1931 (dismissing a decertification petition because the employer "*improperly assisted*" in its filing); Clyde J. Merris, *supra*, 77 NLRB 1375 at 1377 (dismissing a decertification petition filed by a foreman, finding that no question concerning representation exists); Edison Brothers, Inc. (1959) 123 NLRB 872, 874 (dismissing a decertification petition "*initiated and fostered*" by the employer) (emphasis added); Worthington Corp. (1957) 119 NLRB 306, 307(dismissing decertification petition where supervisor gathered signatures for the showing of interest); Gold Bond, Inc.(1954) 107 NLRB 1059, 1060 (dismissing decertification petition "*fostered*" by the employer) (emphasis added); Consolidated Blenders, Inc. (1957) 118 NLRB 545, 547 (dismissing decertification petition in which the employer improperly *assisted*); Birmingham Publishing Co. (1957) 118 NLRB 1380, 1383 (dismissing decertification petition *initiated and fostered* by the employer).

Simply put, neither the ALRB or NLRB permit an employer to "circumvent the Act by ordering or inducing a rank-and-file employee to file a petition, which the employer itself cannot do. . ." M. Caratan, Inc., *supra,* at 6. To permit this, the Board would be ignoring "case precedent and [its] responsibility to conduct elections free of employer instigation or design." Id. Such conduct is not tolerated by either Board.

III. IN DISMISSING DECERTIFICATION PETITIONS IN ULP CASES, NEITHER BOARD USES AN OUTCOME DETERMINATIVE TEST OR REQUIRES PROOF OF HOW MANY EMPLOYEES KNEW OF THE EMPLOYER MISCONDUCT.

Some public comments may state that the Board should dismiss a decertification petition *only if* the results of the election are affected by an employer's unlawful

assistance in the petition.[4] Such an argument flies in the face of well established ALRB and NLRB precedent that require dismissal of any decertification petition when there is any taint of employer involvement. Because both the ALRB and NLRB have clearly distinguished the standard for overturning elections based on objections from the standard for dismissing decertification petitions based on employer involvement, the outcome determinative test has no applicability to a ULP proceeding. Instead, in ULP proceedings, a violation of the Act is not predicated on a finding of "actual coercive effect," but on the "tendency of such conduct to interfere with the free exercise of employee rights under the Act." Amason, Inc. (1984) 269 NLRB 750. Thus, "when an employer has committed unfair labor practices in connection with an employee decertification effort, the Board does not require proof of how many employees were exposed to or were aware of the employer's illegal conduct." Samaritan Medical Center (1995) 319 NLRB 392, 396, *citing* Manhattan Eye, Ear, & Throat Hosp. (1986) 280 NLRB 113, at 115, fn.7; see also Wire Products Manuf'g. Corp. (1998) 326 NLRB 625, 627 (finding that actual knowledge by employees of unfair labor practices need not be shown).

This rule of not requiring proof of actual coercive effect is based on the Board's unwillingness to allow employers to "enjoy the fruits of [their] violations by asserting that certain of its employees did not know of [their] unlawful behavior. . ." The Hearst Corp. (1986) 281 NLRB 764, 765. Instead, the Board holds employers responsible for the "predictable consequence of [their] misconduct . . ." Id. Obviously, the predictable consequence of an employer's initiation and assistance is to substitute its employees' choice for a union representative with its own. Regardless of how many employees knew of their employer's unlawful assistance, a violation has been established because of the tendency of this conduct to violate employee rights to select or reject their own bargaining representative. Therefore, to adopt an outcome determinative rule would effectively overturn years of established precedent and give the green light to employers to initiate and assist in decertification efforts, so long as they are "sneaky" about it.

Some public comments may also take the position that the ALRB should follow the NLRB Case Handling Manual in cases where there has been employer involvement in decertification petitions. Section 11730.3 of the manual directs that the Regional Director "subtract" the "tainted" showing of interest from the "untainted showing" to determine if there would still be a valid showing of interest under which the decertification petition could proceed. See NLRB Case Handling Manual, Part One – Unfair Labor Practices § 1170.3.

As an initial matter, there does not appear to be any NLRB case where an ALJ or Board applied section 11730.3 and did not order dismissal of a decertification petition tainted by employer involvement.[5] More importantly, the ALRB is not required to follow

[4] An outcome determinative test applies to overturning an election based on election objections, but not in ULP cases involving assistance or instigation. See 8 Cal. Code Regs. § 20365.

[5] Even if section 11730.3 is used by a Regional Director to proceed with a decertification election, such a decision is only a non-jurisdictional one whereby the Director determines that the Board's resources should be spent on conducting a decertification election. It would not be a final binding position on the issue of

the procedural precedents of the NLRB. See F & P Growers Assoc. (1985) 168 Cal. App 3d 667, 672 - 678; Cadiz v. ALRB (1979) 92 Cal. App 3d 365, 374; Coastal Berry Co. (1998) 24 ALRB 4, 23 (Dissent by Ramos Richardson). Instead, the ALRB must only follow that NLRB precedent which is "applicable" to the agricultural setting. See F & P Growers, Id.; Cadiz, Id. at 375 – 376. As discussed *supra*, the Board and Court of Appeals in F & P Growers ruled that significant differences between the ALRA and NLRA did not require the ALRB to follow national Board precedent with respect to decertification issues. The Board and Court discussed the following significant differences in ruling that NLRB precedent should not be followed: the ALRA does not permit voluntary recognition of a union, the ALRA does not permit employers to file for elections and the ALRA does not permit withdrawal of recognition. On the other hand, all of these actions are permitted under the NLRA. See F & P Growers, Id. 673 – 677.

Because the California Legislature was clearly concerned with prohibiting an employer "from being an active participant in determining" union representation, and because no NLRB case has applied that section of the Manual and not dismissed a tainted petition, this Board should not employ a rule where the tainted part of a petition is"subtracted" from the untainted. See F & P Growers, Id.[6] In addition to conflicting with well established precedent, such a rule would invite employers to unlawfully assist employees in decertifying unions, but only in a "minor" or *"de minimis"* manner. Such an approach would effectively eliminate the line of demarcation between employees and employer agents that both Boards have ardently tried to protect. It would also make a mockery of the Board's process if such a standard was allowed, since it would allow employer's to keep well hidden their instigation activities in a decertification petition, while being more open with their assistance activities in a decertification petition. Such a standard would turn the Legislative intent of prohibiting employers from being involved in employee determination of representation on its head.

QUESTION 2

Do the factors listed in Overnite Transportation Company (2001) 333 NLRB 1392 apply in cases involving unlawful employer assistance in procuring the showing of interest for a decertification petition?

SHORT ANSWER

No. Overnite Transportation presents factually and legally distinct issues from those arising in situations involving only employer initiation or assistance in procuring

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whether the unlawful assistance or initiation should result in dismissal of the decertification petition. More importantly, as set out in footnote 6 *infra*, this is not the relevant section for analysis of a case where there has already been an election.

[6] Moreover, section 11730.3 would not apply to a case where the decertification election already occurred and where there was a subsequent ULP hearing; i.e. as in Gallo Vineyards, Inc., 03-CE-9-1-SAL. When an election has already occurred, the relevant section of the NLRB Case Handling Manual is section 11028.4. See NLRB Case Handling Manual, Part Two – Representation Proceedings,§ 11028.4. This section directs dismissal of a decertification petition tainted by employer involvement because the petition is null and void *ab initio*. Such a directive is consistent with both NLRB and ALRB law.

signatures for a decertification petition. Further, the factors listed in Overnite Transportation derive from Master Slack Corp., (1984) 271 NLRB 78, a case involving an employer's withdrawal of recognition, something that is not permitted under the ALRA.

DISCUSSION

In Overnite Transportation, the issue resolved by the Board was whether numerous "hallmark" violations of the Act by the employer caused employee disaffection leading to the filing of decertification petitions at more than one facility. The Board found that the employer had committed numerous violations of the Act as early as four years prior to the filing of the decertification petitions. These violations included: threats of job loss, threats of plant closure, threats of loss of pension benefits, threats to impose more onerous working conditions, wage increases to employees in non-represented facilities, withholding wage increases, granting overtime to non-represented employees, and refusing to bargain in good faith. Overnite Transportation, *supra*, at 1393 – 1394. The Board stated that "a causal connection must be shown between the unfair labor practices and the subsequent employee disaffection with the union in order to find that a decertification petition is tainted, thereby requiring that it be dismissed." Id. at 1393.

In determining whether a causal connection exists, the Board looks to the factors found in Master Slack Corp.: (1) the length of time between the unfair labor practices and the withdrawal of recognition or the filing of the decertification petition; (2) the nature of the illegal acts and the possibility of their "effect" on employees; (3) any tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. Overnite, Id. at 1393; Master Slack, *supra*, at 84. The Board applied these factors and found that the employer's unfair labor practices, though as old as four years old, had been unremedied and caused the employee disaffection. The Board therefore ruled to dismiss the decertification petitions in the case. Overnite, at 1396 – 1397.

For several reasons, the factors in Overnite do not and should not apply to cases that involve only employer assistance or instigation in the procurement of signatures for a decertification petition. First, the facts in Overnite and Master Slack are completely different from cases involving only employer assistance or instigation in the procurement of signatures for a decertification petition. Overnite and Master Slack involved the commission of "hallmark" violations of the Act that did not relate to procurement of signatures for a decertification petition. The critical issue in those cases was whether the unlawful employer acts caused employee disaffection leading to decertification petitions (Overnite) or withdrawal of recognition (Master Slack). Thus, the employer action did not involve supervisors procuring, or assisting in the procurement of signatures for a decertification petition and did not involve the fundamental issue of whether there is a genuine question concerning representation. On the other hand cases involving unlawful assistance, or instigation, of decertification petitions strikes at the core issue of whether

there exists a question concerning representation.[7] Such was the issue in a case like Gallo Vineyards, Inc., 03-CE-9-1-SAL, which concerned the initiation and assistance of decertification petitions by two company supervisors. Such a difference in facts is critical in appropriately analyzing and deciding cases involving unlawful initiation and assistance as opposed to cases analyzing only employee disaffection.

Second, as discussed in response to Question 1 above, both the ALRB and NLRB have well established guidelines for dealing with cases involving only employer assistance or initiation of decertification efforts; i.e. if there is any employer involvement, whether by assistance or initiation, the resulting decertification petition will be dismissed. Third, the Union is not aware of any case where the National Labor Board has applied the Master Slack factors to a case which only involves employer assistance or initiation of decertification efforts.

Fourth, the Master Slack factors derive from a case involving an employer's withdrawal of recognition from a union based on a petition signed by its employees which indicted they no longer wished to be represented by the union. The Board there held that numerous unfair labor practices by the employer were remedied and did not warrant finding the employer unlawfully withdrew recognition. Master Slack, 278 NLRB at 78. Further, there was no evidence that the employer was involved in the employee petition indicating the employees did not want to be represented by the union. Again, these facts are completely different than the facts presently before the Board.

In addition, as discussed *supra*, the ALRA does not permit employers to withdraw recognition from a union under any circumstances. Instead, the ALRB has provided a strict rule that a union is "certified until decertified." See Lu-ette Farms (1982) 8 ALRB 91, at 5; Nish Noroian Farms (1982) 8 ALRB 25, at 15.[8] Because of this, such a case concerning withdrawal of recognition cannot be applied to an agricultural setting involving employer initiation or assistance in the procurement of signatures for a decertification petition. See also F & P Growers Assoc. (1985) 168 Cal. App 3d 667 (ALRB and Appeals Court held that significant differences between the ALRA and NLRA did not require the ALRB to follow national Board precedent with respect to decertification issues).

For all these reasons, it would be a serious mistake to apply the Master Slack/Overnite factors to cases involving only employer initiation or assistance in the procurement of signatures for a decertification petition.

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[7] It can be said that "disaffection" cases analyze whether the question concerning representation was "unlawfully" caused by violations of the law.

[8] Under this rule, a certified union can only lose representation of a bargaining unit through decertification, certification of a rival union, by becoming defunct, or by disclaiming interest in representation. See Lu-ette Farms, *supra*, at 5.

QUESTION 3

Are NLRB cases involving unlawful employer assistance, in the context of withdrawals of recognition or RM petitions, apposite or inapposite to cases involving only employee initiated decertification petitions?

SHORT ANSWER

NLRB cases involving unlawful employer assistance in the context of withdrawals of recognition or RM petitions should guide the ALRB but should not be considered binding precedent. Because withdrawals of recognition and RM petitions are not permitted under the ALRA, NLRB cases involving these issues have limited applicability both factually and legally. However, when the facts and issues of withdrawal or RM cases are helpful to deciding an issue involving unlawful assistance in decertification efforts, the Board should use such NLRB cases for guidance only.

DISCUSSION

As previously discussed, the ALRB should follow only that NLRB precedent which is "applicable" to the unique agricultural setting. See F & P Growers Assoc. (1985) 168 Cal. App 3d 667, 672 - 678; Cadiz v. ALRB (1979) 92 Cal. App 3d 365, 374 - 376; Coastal Berry Co. (1998) 24 ALRB 4, 23 (Dissent by Ramos Richardson). In contrast to the NLRA, the ALRA does not permit voluntary recognition of a union, does not permit employers to file for elections (representation or decertification), and does not permit withdrawals of recognition. Because of this, any withdrawal of recognition or RM case before the NLRB will have limited applicability to issues arising under the ALRA.[9] For this reason, the ALRB should not consider any NLRB cases involving withdrawals or RM petitions as binding precedent. However, if the facts of a withdrawal case or RM case are similar to a case involving unlawful employer assistance of a decertification petition, then this Board should be able to resort to that case as "guidance," but not as binding authority. In all cases however, this Board should be mindful that the ALRA has been more vigilant in clearly separating employees from employer agents and in this way protecting employees from employer coercion in the selection of a bargaining representative.

CONCLUSION

Both the ALRA and NLRA are eminently concerned with acting on questions concerning representation and protecting employee rights to choose their own representative. For this reason, when there has been any taint of employer involvement in decertification petitions, whether by unlawful assistance or initiation, both Boards hold that the unlawful employer action nullifies any question concerning representation, and

[9] It is impossible to imagine (and thus discuss) the hundreds of circumstances under which a withdrawal or RM case may arise. It is partly for this reason, and because the ALRA does not permit withdrawal or RM petitions, that the Union requests that the Board only resort to use of NLRB withdrawal and RM cases for guidance and not binding authority.

voids any decertification petition and resulting election. Neither Board examines how minimal or severe the employer involvement is, nor how many employees knew about it. Instead, as a matter of protecting employee rights, both Boards dismiss any tainted decertification petition. This Board should not accept invitations to deviate from this practice or to create a new law allowing for examination of how "severe" the employer involvement may be. Such a deviation would invite employers to provide only "minimal" assistance or to be utterly deceptive about their involvement. Such a result is not what was intended by either Act. Instead, this Board should continue to protect the most fundamental right in the ALRA: that of employee choice.

Respectfully Submitted,

Mario Martinez
MARCOS CAMACHO, A LAW CORP.
Attorneys for United Farm Workers of America, AFL-CIO